

Export Controls and Securitization of Economic Policy: Comparative Analysis of the Practice of the United States, the European Union, China, and Russia

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National security rhetoric has gained prominence due to increasingly pervasive digitalization, the emergence of cutting-edge technologies, and developments in artificial intelligence and machine learning. Increased reliance on these areas fuels industrial development but also renders national economies vulnerable to foreign interference. Ultimately, the current wave of technological development with its potential threats intensifies competition between states and redefines their economic and military advantages over potential global rivals. Against this background, certain states have expanded the scope of their export control regimes by extending the lists of controlled items and/or imposing 'catch-all' control. Used in conjunction with economic sanctions, weaponized tariffs, and extensive investment screening mechanisms aimed to protect national security interests, such measures go beyond conventional non-proliferation purposes to address economic security, technological supremacy, and human rights concerns for which those states are willing to sacrifice the economic efficiency that accompanies trade liberalization. Using the United States, the European Union, China, and Russia as case studies, this article discusses to which extent different export control objectives of these international actors have been securitized. Securitization of certain states' interests is inevitable, even if not desirable. Yet, this article argues that international law can be managed to control and limit the level of securitization of domestic policies in order to strengthen the international legal system as a whole.

Keywords: export controls, national security, economic security, securitization, emerging technologies, technological supremacy

1 INTRODUCTION

Concerns related to national security have been in the limelight of political and academic debates for quite some time.¹ Threats posed by terrorism, foreign election interference, opportunistic takeovers, and espionage have been frequently

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¹ See e.g., Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365 (2003); *Brookings Experts on Trump's National Security Strategy*,

addressed by government leaders as well as scholars in the fields of international affairs,² political science,³ and law.⁴ In recent years, however, national security rhetoric has gained prominence, among others, due to increasingly pervasive digitalization and reliance of many economic sectors on the Information and Communication Technology infrastructure. The emergence of cutting-edge technologies, like generations of cellular network technology for broadband access (i.e., fifth-generation network (5G)), and introduction of the Internet of Things, as well as developments in artificial intelligence (AI), machine learning, hypersonics, and synthetic biology, are touted to revamp the face and the very foundation of modern society and consumerism. Increased reliance on these technologies fuels industrial development but also renders national economies vulnerable to foreign interference. Ultimately, joining the current wave of technological development and mitigating its potential threats are essential for obtaining an economic and military advantage over potential global rivals in the nearest future.⁵

Against this background, amid intensifying competition between major powers for technological leadership and geopolitical hegemony, certain governments have expanded the scope of their export control regimes by extending the lists of controlled items and/or imposing ‘catch-all’ control. Used in conjunction with economic sanctions, weaponized tariffs, and new investment screening mechanisms aimed to protect national security interests, such measures go beyond non-proliferation purposes to address political and moral imperatives for which governments are willing to sacrifice the economic efficiency that accompanies trade liberalization.⁶ In particular, the passage of the Export Control Reform Act (ECRA) of 2018 by the United States (US)⁷ and the new Export Control Law (ECL) of 2020 by China,⁸ as well as the revision of the Council Regulation European Council (EC) No. 428/2009 in the European Union (EU) in 2021

Brookings (blog) (21 Dec. 2017), <https://www.brookings.edu/research/brookings-experts-on-trumps-national-security-strategy/> (accessed 22 Oct. 2021).

² See e.g., Chris C. Demchak, *Wars of Disruption and Resilience: Cybered Conflict, Power, and National Security* (UGA Press 2011).

³ See e.g., Arnold Wolfers, ‘National Security’ as an Ambiguous Symbol, 67 Pol. Sci. Q. 481 (1952).

⁴ See e.g., Shin-Yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. Int’l Econ. L. 449 (2015).

⁵ Brigitte Dekker & Maaïke Okano-Heijmans, *Emerging Technologies and Competition in the Fourth Industrial Revolution: The Need for New Approaches to Export Control*, Clingendael (3 Feb. 2020), <https://www.clingendael.org/publication/need-new-approaches-export-control> (accessed 22 Oct. 2021).

⁶ Timothy Meyer, *The Political Economy of WTO Exceptions*, 99 Wash. U. L. Rev. 1299, 1303 (2022).

⁷ Export Control Reform Act of 2018: 50 U.S.C. §§ 4801–4852 (2018).

⁸ Export Control Law of the People’s Republic of China: Order No. 58 of the President of the People’s Republic of China, Standing Committee of the National People’s Congress (2020), <https://npcobserver.com/legislation/export-control-law/> (accessed 22 Oct. 2021).

(hereinafter ‘EU Dual-Use Regulation’),⁹ have signaled the shift of the focus of export controls from the protection of national security in its traditional sense related to military and defense matters to the protection of economic security, technological supremacy, and human rights concerns.

The push for unilateralism and the increased convergence of economics and national security may manifest the re-emergence of geoeconomic statecraft and the introduction of economic security and geoeconomic calculations in national security strategies and political agenda. The diversity of interests of international actors and the ongoing expansion of the scope of national security leave little room for considering states’ international trade commitments as an idealistic postulate appealing to impersonal systemic values which could eliminate any possibilities for abuses. A perceived lack of accountability for diverging from the undertaken commitments by virtue of the arguably ‘self-judging’ nature of national security exceptions incorporated into most international economic agreements¹⁰ may allow the most influential states to exercise unfettered power in advancing particular ideological positions claimed to obtain a variety of beneficial and humanitarian ends but in practice used as a disguise for protectionism and as a mechanism for invading the sovereignty of other nations.¹¹ In this regard, the distinction between the protection of a state’s legitimate interest and the advancement of a particular policy agenda becomes blurred.¹²

Many scholars address the role of international adjudicators and institutions involved in governing economic and security policies in effectively striking the balance between the protection of national security and international legal responsibilities.¹³ Yet, apart from stability and predictability in the international order, contracting parties may actually appreciate certain virtues in the ambiguous interpretation of national security exceptions and other similarly drafted clauses under international agreements in order to preserve greater flexibility in timing and urgency of response while protecting real and/or perceived concerns over their national sovereignty.¹⁴ Thus, while international oversight can ensure necessary

⁹ Regulation (EU) No. 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) PE/54/2020/REV/2, OJ L 206, 11 Jun. 2021.

¹⁰ United States—Certain Measures on Steel and Aluminium Products DS544, First written submission by the US in WTO (12 Jun. 2019), <https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS548%29.fin.%28public%29.pdf> (accessed 22 Oct. 2021).

¹¹ Wesley A. Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J. Int’l L. 413, 420 (2001).

¹² *Ibid.*, at 414.

¹³ See e.g., Akande & Williams, *supra* n. 1; Tania Voon, *The Security Exception In WTO Law: Entering a New Era*, 113 Am. J. Int’l L. 45 (2019).

¹⁴ Peter Lindsay, *The Ambiguity of Gatt Article XXI: Subtle Success or Rampant Failure?*, 52 Duke L.J. 1277, 1297 (2003).

checks against abusive overuse of national security claims, the current national security discourse shall not set aside the question of whether international mechanisms do leave the states with enough regulatory space to deal with the ever-evolving threats to their national security interests.

Threats to security interests may seemingly range from a direct nuclear attack to the protection of boot manufacturers.¹⁵ Between these two extremes are potentially cyberattacks, information operations, or genetically engineered biological threats, all of which require adequate responses that could successfully eliminate the potential damage to states' national interests but also not be used as means to evade international legal responsibilities. Accommodating the competing demands of national security and legality requires not only transparent and sophisticated procedures for review of the measures undertaken under the guise of national security but also the appreciation of how far and under which conditions different states might push the definition of their national security interests.

This article proceeds in four parts. Taking the perspective of geoeconomics, Part 2 sketches the role in the current global order of the US, the EU, China, and Russia, the members of the World Trade Organization (WTO) playing an essential role as a force for growth in the global economy (hereinafter 'Selected WTO Members'). Parts 3 and 4 advance critical claims: using the recently re-emerged concept of 'securitization' advanced by the Copenhagen School of security studies, they assess whether and to which extent the developments in the export control regimes of Selected WTO Members, in particular, the ones tailored to emerging technologies, manifest securitization of their domestic and/or regional policy objectives. Part 5 finally concludes that while securitization of certain states' interests is inevitable, even if not desirable, international law shall be able to provide a satisfactory level of coherence and control while addressing states' security concerns to strengthen the international legal system as a whole.

2 ROLE OF THE US, THE EU, CHINA, AND RUSSIA IN THE BRAVE NEW WORLD

2.1 US PERSPECTIVE

The institutional liberalism that modulated the foreign policy of so many US governments since the end of World War II has left its place in recent years to a new nationalist unilateralism, whose meaning to President Trump is that 'in every foreign policy decision, we are making clear that we will always put the safety and

¹⁵ Cann, *supra* n. 11, at 464.

security of our citizens first'.¹⁶ The American First principle during Trump's presidency has had an undoubted impact on the US relations with the rest of the world, as it has not only shaped its realistic vision of international relations but also determined its definition of the US vital interests. One of the apparent examples for this is the US National Security Strategy explicitly framing the economic security of the US as a national security issue.¹⁷

The Trump administration implemented policies designed to consider trade, technology, and innovation as core elements of national security. In particular, it focused on sanctions against larger and more systemically important players in the global economy than ever before ensuring the US ability to compete with China, and pressuring Russia, North Korea, Iran, and Venezuela to change their behaviour, but also brought to bear other coercive economic measures – including more pervasive export controls, foreign investment reviews, and tariffs.¹⁸ It can be argued that President Trump has not started anything new in the US foreign policy. The US seemed often 'too easily pricked into intemperate reactions that in themselves work to undermine what it claims to stand for'.¹⁹ Its response to the threats posed by terrorism is one of the examples. President Trump has arguably only given a stronger push to unilateralism through nationalism, with more emotional than rational responses to external challenges.²⁰ His successor President Biden has also embraced that economic security is a part of national security discourse in the US and that the race for technological superiority with China shall go on.²¹

2.2 EU PERSPECTIVE

In looking at the emergence of the EU from a historical perspective, it was founded based on security concerns.²² In international relations, the EU has

¹⁶ Donald J. Trump, *Remarks at the American Legion National Convention* (23 Aug. 2017), <https://www.presidency.ucsb.edu/documents/remarks-the-american-legion-national-convention-renonevada-0> (accessed 22 Oct. 2021).

¹⁷ National Security Strategy of the United States (2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> (accessed 22 Oct. 2021).

¹⁸ Chad P. Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, Peterson Institute for International Economics (4 Oct. 2021), <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf> (accessed 22 Oct. 2021).

¹⁹ Barry Buzan, *Will the 'Global War on Terrorism' Be the New Cold War?*, 82 Int'l Affairs 1101, 1118 (2006).

²⁰ Pedro Francisco Ramos Josa, *An Approach to Donald Trump's Foreign Policy: Towards a New Perspective* (IEEE, Opinion Paper 95/2019 2019), https://www.ieee.es/Galerias/fichero/docs_opinion/2019/DIEEE095_2019PEDRAM_Trump_ENG.pdf (accessed 22 Oct. 2021).

²¹ Frank Kuhn, *Offensive Realism and the Rise of China: A Useful Framework for Analysis?*, E-International Relations (9 Jul. 2021), <https://www.e-ir.info/2021/07/09/offensive-realism-and-the-rise-of-china-a-useful-framework-for-analysis/> (accessed 22 Oct. 2021).

²² Maya Swisa, *Future Stability in the European Union: Realism, Constructivism, and Institutionalism*, 2011 Claremont-UC Undergraduate Research Conference on the European Union 125, 129 (2013).

been described as a normative or civilian actor, whose strength is not in the military, but in soft power, while national security matters remain to be the competence of individual EU members.²³ At the same time, the EU's self-image, which is one of a provider of peace and stability on the European continent, allowed for the institutionalization of formal and informal rules and norms that the EU members are expected to abide by. In particular, it has been acknowledged that certain concerns of EU members can be more efficiently and consistently dealt with on the EU rather than the individual member level.

Over the years, the EU has increased its use of restrictive measures to pursue certain foreign policy objectives within the framework of the Common Foreign and Security Policy (CFSP).²⁴ It adopted several autonomous sanctions regimes that target specific themes, including terrorism, chemical weapons, and cyberattacks.²⁵ Besides, having updated the EU export control regulation and having created the EU's framework for screening foreign investment,²⁶ the European Commission has gained a powerful tool at its disposal for defending European security interests. Consequently, the gradual shift of European security norms, linking terrorism, migration, cyberspace, and protection of human rights with the EU security issues, has arguably contributed to the strengthening of a European identity.

2.3 CHINA'S AND RUSSIA'S PERSPECTIVES

Both China and Russia seem to have a strong imperialistic background and to behave quite antagonistically in their foreign policy.²⁷ Even after the collapse of the Soviet Union, realist issues and concerns have been more salient in subsequent Russian foreign policy.²⁸ Over the last twenty years or so, Russia's foreign policy

²³ Adrian Hyde-Price, 'Normative' Power Europe: A Realist Critique, 13 J. Eur. Pub. Pol. 217, 217 (2006).

²⁴ Geneva Forwood et al., *EU Restrictive Measures*, Global Investigations Review (GIR) (17 Aug. 2020), <https://globalinvestigationsreview.com/guide/the-guide-sanctions/first-edition/article/eu-restrictive-measures> (accessed 22 Oct. 2021).

²⁵ See e.g., Clara Portela, *Where and Why Does the EU Impose Sanctions?*, 17 *Politique Européenne* 83, 89 (2005); *Cyber Attacks: EU Ready to Respond with a Range of Measures, Including Sanctions*, Council of the EU (19 Jun. 2017), <https://www.consilium.europa.eu/en/press/press-releases/2017/06/19/cyber-diplomacy-toolbox/> (accessed 22 Oct. 2021).

²⁶ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 Mar. 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, 21 Mar. 2019.

²⁷ Mazhid Kat, *Conceptual Analysis of Realism in International Political Economy*, E-International Relations (16 Apr. 2015), <https://www.e-ir.info/2015/04/16/a-conceptual-analysis-of-realism-in-international-political-economy/> (accessed 22 Oct. 2021).

²⁸ Peter Ferdinand, *The Positions of Russia and China at the UN Security Council in the Light of Recent Crises*, DG for External Policies of the Union (Mar. 2013), [https://www.europarl.europa.eu/RegData/etudes/note/join/2013/433800/EXPO-SEDE_NT\(2013\)433800_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2013/433800/EXPO-SEDE_NT(2013)433800_EN.pdf) (accessed 22 Oct. 2021).

main concern has been to impulsively capture the decline of Russia's power in the international arena.²⁹ On the contrary, due to the growth of economic power, China has to date maintained, as a state, a significant degree of strength and coherence.³⁰ Constructivist concerns have been more prominent in China's foreign policy since the start of economic reforms in the late 1978th.³¹ In particular, since Xi Jinping's rule, China has been more active in international environments, both with economic projects and in strengthening bilateral and multilateral relations.³²

Both Russia and China appear to confront an emerging new world order and to use conflict, diplomacy, economic measures, and cyberattacks as means to become, at minimum, a regional hegemon in route to being a global superpower. Both states have updated their sanctions toolboxes and adopted counter-sanctions against the countries that had imposed economic coercive measures against them,³³ viewing such measures as necessary to protect, among others, their national security interests. The political rationale behind the Russian counter-sanctions scheme starting from 2014, however, seems also to give an advantage to Russian domestic producers that are not competitive on a global market.³⁴ Regarding sanctions with Chinese characteristics, against the backdrop of the growing tensions between the US and China and huge strides through enacting new Chinese legislation which enables it to impose unilateral sanctions, China is expected to employ instruments of economic statecraft with increasing frequency in the nearest future. Unclear motives for the adoption of security measures by China and Russia may give a different standpoint to the national security rhetoric in these countries.

3 CONCEPTUAL DIMENSIONS OF SECURITIZATION

The concept of securitization offers a means of comprehending what makes something a security issue in international relations.³⁵ Advanced by the

²⁹ Andrew Hurrell, *Hegemony, Liberalism and Global Order: What Space for Would-Be Great Powers?*, 82 Int'l Affairs 1, 18–19 (2006).

³⁰ *Ibid.*, at 19.

³¹ Ferdinand, *supra* n. 28.

³² Alana Camoça Gonçalves de Oliveira, *From Panda to Dragon: An Analysis of China's Maritime Actions and Reactions in the East China Sea and Their Implications Since 2012*, 43 Contexto Internacional 147, 157 (2021).

³³ See e.g., Decree of the President of the Russian Federation dated 22 Oct. 2018 No. 592 On implementation of special economic measures in connection with inimical actions of Ukraine in relation to Russian citizens and legal entities (as amended); People Republic of China's Anti-Foreign Sanctions Law promulgated by the Standing Comm. Nat'l People's Cong, 10 Jun. 2021.

³⁴ Susanne Oxenstierna & Per Olsson, *The Economic Sanctions against Russia: Impact and Prospects of Success*, Stockholm: Swedish Defense Research Agency (FOI), Report No. 4097-SE, 44 (2015).

³⁵ James Sperling & Mark Webber, *The European Union, Security Governance and Collective Securitization*, 42 West Eur Polit 228, 238 (2019).

Copenhagen School of security studies, it depicts national security as a speech act rather than necessarily an objective condition that allows securitizing agents (elites and/or those in a position to make their voices heard) to present an issue as an existential threat, thereby fostering the application to it of extraordinary measures designed for security matters.³⁶ In practice, the speech act itself will only very rarely explain the entire social process that follows from it.³⁷ In most cases, thus, a scholar will rather be confronted with a process of articulations, rather than a single security articulation at a particular point in time, creating sequentially a threat text which turns sequentially into securitization.³⁸

Securitization shifts an issue from normal politics into the realm of security. Notably, the process of securitization is successful only if the audience accepts the emergency measures.³⁹ The question of what exactly constitutes the audience's acceptance has given rise to many discussions.⁴⁰ For example, it is still debatable whether, for an issue to be regarded as securitized, the audience has to concur with the diagnosis alone, the cure proposed, or potentially both.⁴¹ For the purpose of this article, it is assumed that once normal means and actions are replaced by security concerns, and extraordinary protection measures are imposed and successfully enforced, the issue has been securitized. Such extraordinary protection measures must not always include force, but can also alternate actions such as economic sanctions⁴² or, similarly, export control restrictions.

The concept of securitization emerged from a growing debate among security scholars in the 1990^s challenging realist and liberal views on security that, among others, struggled to explain the peaceful end of the Cold War.⁴³ In its essence, the concept of securitization is seen as a synthesis of constructivist and realism in its approach.⁴⁴ In particular, the specificity of security in the work of the Copenhagen School is underpinned by the focus on existential threats as the essence of security, and the definition of securitization as placing an issue beyond normal politics,

³⁶ Biljana Vankovska, *Dealing with COVID-19 in the European Periphery: Between Securitization and 'Gaslighting'*, 7 J. glob. faultlines 71, 74 (2020).

³⁷ Holger Stritzel, *Towards a Theory of Securitization: Copenhagen and Beyond*, 13 Eur. J. Int 357, 377 (2007).

³⁸ *Ibid.*, at 377.

³⁹ Andrew Stephen Campion, *From CNOOC to Huawei: Securitization, the China Threat, and Critical Infrastructure*, 28 Asian J. Pol. Sci 47, 49–50 (2020).

⁴⁰ Thierry Balzacq, Sarah Léonard & Jan Ruzicka, 'Securitization' Revisited: Theory and Cases, 30 Int'l Relations 494, 499–501 (2016).

⁴¹ *Ibid.*, at 520.

⁴² Sabine Hirschauer, *The Securitization of Rape: Women, War and Sexual Violence* 27 (Palgrave Macmillan 2014).

⁴³ *Ibid.*, at 25.

⁴⁴ Michael C Williams, *Words, Images, Enemies: Securitization and International Politics*, 47 Int Stud Q 511, 528 (2003).

which has deep roots in Schmitt's realistic understanding of political order.⁴⁵ The securitization theory also has a close affinity with constructivism, in particular with the works that analyse the role of language and practice, and the power of argument in world politics.⁴⁶ Among others, it examines security measures as specific forms of social construction, and securitization as a special kind of social accomplishment.⁴⁷

The concept of securitization has also proved its usefulness as a tool for empirical research.⁴⁸ It is considered to be well-equipped for articulating the security nature of new national and global issues, such as environmental crisis or migration, and for untangling the political implications of the designation of some phenomena as threats. For instance, many scholars have examined the developments in the energy sector after crises between Ukraine and Russia in 2008 and 2009 in the terms of securitization.⁴⁹ Furthermore, securitization analysis can help to understand why certain security moves can be expected in given national security discourse, why some of them may find a receptive audience, and why certain actions can subsequently follow.⁵⁰

One of the criticisms of the Copenhagen School's original version of securitization theory is in that it focuses on how security threats are politically and socially constructed, rather than on what kinds of security threats objectively exist, and therefore precludes objective threat assessment.⁵¹ Furthermore, the Copenhagen School also rejects the theorization of securitizing actors' intentions, which means that the original securitization theory does not necessarily contribute to the normative analysis necessary for the contemplating of the role of security measures in the current global order.⁵² On the flipside, securitization theory provides the tools for theorists and practitioners in the fields of international affairs, political science, and law to observe security in a self-reflective and cautious manner and thereby fosters constructive and holistic responses to security threats, which encompass diverse approaches and alternative outlooks.⁵³ With all this in mind, existing studies in securitization may offer ample insight on how to talk about new export control objectives, how to explain the choice to securitize cross-

⁴⁵ *Ibid.*, at 515.

⁴⁶ Balzacq et al., *supra* n. 40, at 496.

⁴⁷ Williams, *supra* n. 44, at 514.

⁴⁸ Balzacq et al., *What Kind of Theory - If Any - Is Securitization?*, 29 *Int'l Relations* 96, 98 (2015).

⁴⁹ Balzacq et al., *supra* n. 40, at 507.

⁵⁰ Stefano Guzzini, *Securitization as a Causal Mechanism*, 42 *Security Dialogue* 329, 338 (2011).

⁵¹ Rita Floyd, *Can Securitization Theory Be Used in Normative Analysis? Towards a Just Securitization Theory*, 42 *Security Dialogue* 427, 427 (2011).

⁵² *Ibid.*, at 428.

⁵³ Catherine Charrett, *A Critical Application of Securitization Theory: Overcoming the Normative Dilemma of Writing Security* (International Catalan Institute for Peace, Working Paper No. 2009/7 2009), <https://ssrn.com/abstract=1884149> (accessed 22 Oct. 2021).

border trade in certain goods rather than treating it as a part of states' normal policies, and finally how international law might affect the process and level of securitization of national interests of different states.

4 EXPORT CONTROL REGIMES IN THE US, THE EU, CHINA, AND RUSSIA: ANYTHING NEW?

4.1 EXPORT CONTROLS IN THE US

The US maintains one of the strictest export control regimes on dual-use goods and technologies.⁵⁴ It has been evolving dynamically since the early days reflecting the US strategic interests which are changing from administration to administration as time goes by.⁵⁵ Starting with the passage of the Export Control Act in 1949 codifying Congress's wartime policy that prohibited the export of all goods and technology from the US unless the exporter obtained a specific license, the use of export controls has been expanded to accomplish US foreign policy objectives in order to address the rise in international terrorism and human rights abuses.⁵⁶ The US has played a leading role in the creation of various multilateral export-control regimes and continues to support export-control development in other countries through different incentives.⁵⁷

Even though the stated objective of the US export controls remains advancing of US national security interests, not supply-chain resilience, it cannot be excluded that certain export restrictions could serve multiple purposes and contribute to 'nearshoring' as companies adjust their supply chains to avoid countries subject to these export controls.⁵⁸ In particular, when the US passed the ECRA in 2018, one of its national security policy goals stated was that '... the national security of the United States requires that the United States maintain its leadership in the science, technology, engineering and manufacturing sectors ... Such leadership requires that United States persons are competitive in global markets'.⁵⁹ Protecting the

⁵⁴ Belay Seyoum, *Export Controls and International Business: A Study with Special Emphasis on Dual-Use Export Controls and Their Impact on Firms in the US*, 51 J. Econ. Issues 45, 46 (2017).

⁵⁵ *Historical Background of Export Control Development in Selected Countries and Regions US, EU, U.K., Germany, France, Hungary, Russia, Ukraine, Japan, South Korea, China, India and ASEAN*, CISTEC (Apr. 2016), https://www.cistec.or.jp/english/service/report/1605historical_background_export_control_development.pdf (accessed 22 Oct. 2021).

⁵⁶ Export Administration Amendments, H.R.5840, 95th Cong. (1977), <https://www.congress.gov/bill/95th-congress/house-bill/5840> (accessed 22 Oct. 2021).

⁵⁷ Belay Seyoum, *National Security Export Control Regimes: Determinants and Effects on International Business*, 59 Thunderbird Int. Bus. Rev. 693, 703 (2017).

⁵⁸ Annie Froehlich, *Regulatory Combat: Export Controls as Ammunition Against National Security Threats* (14 Sep. 2020), <https://www.atlanticcouncil.org/blogs/new-atlanticist/regulatory-combat-export-controls-as-ammunition-against-national-security-threats/> (accessed 22 Oct. 2021).

⁵⁹ 50 US Code § 4811. Statement of policy (2018).

global leadership role in the science and manufacturing sectors in order to maintain the competitiveness of US companies in international markets implies some economic considerations and therefore confirms that the context of the national security mentioned in the ECRA is understood broader than the traditional military-oriented national security concerns.⁶⁰

As the recent developments demonstrate, much of the call to action on export controls in the US arose out of growing US government concerns over China.⁶¹ Over the past years, the Trump administration has relied on export controls to deny China access to US technologies that might be used to modernize China's military.⁶² Longstanding US leadership in technological development and innovation has been contested by new rising competitors, especially in sectors with significant security implications, such as 5G. In particular, the Chinese telecommunications giant, China's Huawei Technologies Co. (Huawei) is outpacing other companies in developing 5G, in part because it has received massive state subsidies from the Chinese government and can offer favourable financing terms to prospective clients, which threatens the long-term security of US data, and that of its allies and partners.⁶³ Therefore, it is not surprising that the primary initial target of new US export restrictions was Huawei, but also Chinese partially state-owned technology company ZTE Corporation (ZTE).⁶⁴

To illustrate, in May 2019, the Bureau of Industry and Security (BIS) in the US added Huawei to the controlled entity list.⁶⁵ In making the original designation, the BIS indicated 'that there is reasonable cause to believe that [Huawei] has been involved in activities determined to be contrary to the national security or foreign policy interests of the United States'.⁶⁶ As a result of the listing, no person may export, re-export, or transfer any regulated items to Huawei, absent a specific license from the BIS. Items subject to US export controls are not limited to those originating in the US but include certain foreign-developed or – produced items. Accordingly, certain items that have never been within the territorial bounds of the US are still captured, and transfers of such items – by any person, regardless of

⁶⁰ Cindy Whang, *Trade and Emerging Technologies: A Comparative Analysis of the United States and the European Union Dual-Use Export Control Regulations*, Security & Hum. Rights 1, 16 (2021).

⁶¹ Chad P. Bown, *Export Controls: America's Other National Security Threat*, 30 Duke J. Comp. & Int'l L. 283, 285 (2020).

⁶² *2020 Year-End Sanctions and Export Controls Update*, Gibson Dunn (5 Feb. 2021), <https://www.gibsondunn.com/2020-year-end-sanctions-and-export-controls-update/> (accessed 22 Oct. 2021).

⁶³ *Economic Might, National Security, and the Future of American Statecraft*, Texas National Security Rev. (6 May 2020), <http://tnsr.org/2020/05/economic-might-national-security-future-american-statecraft/> (accessed 22 Oct. 2021).

⁶⁴ Bown, *supra* n. 61, at 289.

⁶⁵ BIS, Final Rule, Addition of Entities to the Entity List, 84 FR 22961, <https://www.federalregister.gov/documents/2019/05/21/2019-10616/addition-of-entities-to-the-entity-list> (accessed 22 Oct. 2021).

⁶⁶ Froehlich, *supra* n. 58.

location or nationality – to Huawei without a BIS license would result in a violation of the US export control regulations.⁶⁷

In January – February 2020, the Trump administration continued to apply or threaten to apply certain other restrictions primarily concerning Chinese technology companies: it announced new export controls on AI software, was contemplating a ban on exports of jet engines to China for use in civil aircraft and a new rule to prohibit US companies from supplying equipment to foreign manufacturers of semiconductors that would use it for making chips to sell to China.⁶⁸ The BIS also expanded the export controls to cover additional items that are the direct product of certain US-origin technology and software,⁶⁹ and thus further cripples Huawei's critical supply chain.⁷⁰

Consequently, the recent US practice suggests that although economic sanctions are often the go-to regulatory device to address national security and foreign policy concerns, the US government has increasingly exercised its export controls regulations for similar purposes.⁷¹ The trade conflict with China, the need to maintain technological leadership, and the strategic position in the international arena have broadened the purpose of dual-use export control policies in the US to include, among others, the protection of economic interests. In particular, the passage of the ECRA and the proclamation of the objective to maintain the competitiveness of US companies in international markets could be seen as the confirmation that economic considerations are being added into the US strategic policies underlying export controls.⁷²

The recent rhetoric of the US thus suggests that the economic relations with China have been defined as an existential security threat to the US that warrants emergency measures outside the scope of normal political procedures.⁷³ Drawing on the constructivism paradigm that security emerges from subjective interpretations of how identity impacts foreign policy, the China threat might not be objectively valid but discursively produced.⁷⁴ Nevertheless, the US reactions to Huawei and ZTE demonstrate a pattern of practices rather than a mere occurrence.⁷⁵ It seems that the changes in a transformed and far more interdependent international economy have spawned the new international friction

⁶⁷ *Ibid.*

⁶⁸ Bown, *supra* n. 61, at 299.

⁶⁹ Froehlich, *supra* n. 58.

⁷⁰ *Ibid.*

⁷¹ Froehlich, *supra* n. 58.

⁷² Whang, *supra* n. 60, at 16.

⁷³ Kuhn, *supra* n. 21.

⁷⁴ Campion, *supra* n. 39, at 50.

⁷⁵ *Ibid.*, at 61.

manifested in the battle for market share in leading-edge sectors between the US and China, as well as the rivalry among the different market systems.⁷⁶

4.2 EXPORT CONTROLS IN THE EU

Export control regulation is not listed as an area of EU exclusive competence.⁷⁷ However, it is closely connected to the EU's common commercial policy, which comes within the EU exclusive competence.⁷⁸ The practice of the Court of Justice of the EU (CJEU) confirms that the measures that prevent or restrict the export of certain goods cannot be treated as falling outside the scope of the common commercial policy on the ground that they have foreign policy and security objectives.⁷⁹ At the same time, in *Werner*⁸⁰ and *Leifer*,⁸¹ the CJEU accepted that an EU member could also control exports unilaterally on the ground that this is required from the perspective of public security. Consequently, in the EU, export control includes both EU-wide restrictions provided for through EU legislation (EU competence), as well as EU member-specific export controls set out at a national level (members competence).⁸² In each case, these controls are administered and enforced at the national members' level.⁸³

The competence of the EU on export controls has evolved significantly since the early 1990s.⁸⁴ The revised EU Dual-Use Regulation has been largely viewed as a response to recent geopolitical and technological developments, including cyber-surveillance, creating an increased risk for global security and human rights, the broadening expanse of dual-use technologies, and the growing number of local high-tech companies.⁸⁵ Peter Altmaier, Germany's federal minister for economic

⁷⁶ Sylvia Ostry, *The Domestic Domain: The New International Policy Arena*, 1 *Transnational Corporations* 7, 10 (1992).

⁷⁷ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

⁷⁸ Hamed Alavi & Tatsiana Khamichonak, *A European Dilemma: The EU Export Control Regime on Dual-Use Goods and Technologies*, 7 *Danube* 161, 162 (2016).

⁷⁹ Piet Eeckhout, *Sanctions Policy*, in *EU External Relations Law* 535 (Oxford University Press 2d ed. 2011).

⁸⁰ Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v. Germany* [1995] ECR I-3189.

⁸¹ Case C-83/94, *Criminal Proceedings Against Peter Leifer and Others* [1995] ECR I-3231.

⁸² Anahita Thoms, Tristan Grimmer & Ben Smith, *Export Controls in the European Union and United Kingdom*, *Global Investigations Rev. (GIR)* (17 Aug. 2020), <https://globalinvestigationsreview.com/guide/the-guide-sanctions/first-edition/article/export-controls-in-the-european-union-and-united-kingdom> (accessed 22 Oct. 2021).

⁸³ *Ibid.*

⁸⁴ Anna Giulia Micara, *Current Features of the European Union Regime for Export Control of Dual-Use Goods*, 50 *J. Common Mark. Stud.* 578, 591 (2012).

⁸⁵ *Commission Welcomes Agreement on the Modernisation of EU Export Controls*, European Commission (9 Nov. 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2045 (accessed 22 Oct. 2021).

affairs and energy, stressed that ‘... [t]he new rules strike the right balance between strengthening the competitiveness of the EU, ensuring [EU] security interests and promoting human rights’.⁸⁶

Notably, the EU export control reform was initiated in particular because of revelations in early 2010th that EU-originated surveillance products and expertise had been sold to authoritarian regimes.⁸⁷ According to the available reports, EU companies had supplied surveillance technology to Iran, Libya, and Syria, states that were accused of using them in connection with serious violations of human rights.⁸⁸ To illustrate, a French company Amesys (a subsidiary of Bull, and now Nexa Technologies) was subjected to a criminal court case in France and accused of complicity with human rights abuses in Libya for providing the Gaddafi government with surveillance equipment that was used to intercept private internet communications to identify, seek out, and torture opponents of Gaddafi.⁸⁹ One of the recent examples of such revelations was the sale of surveillance drones to Belarusian authorities amid a police crackdown in 2020.⁹⁰

The discussions over the necessity for the EU to be able to respond to the challenges posed by emerging dual-use technologies – especially cyber-surveillance technologies – that pose a risk to national and international security have started back in 2014. In the Communication to the Council and the European Parliament, the Commission reinforced that weapons of mass destruction (WMD) proliferation ‘... still constitutes one of the greatest security risks for the EU, especially as an increasing number of states are developing capabilities of proliferation concern’.⁹¹ It also highlights that ‘[c]yber-security is now *crucial for the security of the EU* and “cyber-proliferation” has become an important dimension of export controls’⁹² and that it would consider ‘evolving towards a “human

⁸⁶ *New Rules on Trade of Dual-Use Items Agreed*, Council of the EU (9 Nov. 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/11/09/new-rules-on-trade-of-dual-use-items-agreed/> (accessed 22 Oct. 2021).

⁸⁷ Heejin Kim, *Global Export Controls of Cyber Surveillance Technology and the Disrupted Triangular Dialogue*, 70 *Int'l & Comp. L.Q.* 379, 405 (2021).

⁸⁸ Mark Bromley, *A Search for Common Ground: Export Controls on Surveillance Technology and the Role of the EU*, Intel (12 Feb. 2020), <https://aboutintel.eu/surveillance-export-control-eu/> (accessed 22 Oct. 2021).

⁸⁹ *Executives of Surveillance Companies Amesys and Nexa Technologies Indicted for Complicity in Torture*, Amnesty International (22 Jun. 2021), <https://www.amnesty.org/en/latest/press-release/2021/06/executives-of-surveillance-companies-amesys-and-nexa-technologies-indicted-for-complicity-in-torture/> (accessed 22 Oct. 2021).

⁹⁰ *EU Justifies Buying Surveillance Drones for Belarus*, EU Observer (6 Oct. 2020), <https://euobserver.com/foreign/149650> (accessed 22 Oct. 2021).

⁹¹ Communication from the Commission to the Council and the European Parliament, *The Review of Export Control Policy: Ensuring Security and Competitiveness in a Changing World*, COM/2014/0244 final (2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0244&from=LT> (accessed 22 Oct. 2021).

⁹² Communication from the Commission to the Council and the European Parliament, *The Review of Export Control Policy: Ensuring Security and Competitiveness in a Changing World*, COM/2014/0244 final

security” approach recognizing that security and human rights are inextricably interlinked’.⁹³

Starting with the EU Global Strategy in 2016,⁹⁴ the concept of human security has spread more widely among EU institutions in organizational and functional terms.⁹⁵ The Commission adopted its legislative proposal to modernize EU controls on exports of sensitive dual-use goods and technology in September 2016 (hereinafter ‘Proposal’).⁹⁶ The Proposal:

responds to the need to protect national security and public morals, in consideration of the proliferation of cyber-surveillance technologies whose misuse poses a *risk to international security as well as the security of the EU*, its governments, companies, and citizens, and to the protection of human rights and digital freedoms in a globally connected world.⁹⁷

In its Report on the EU Export Control Policy Review, the Commission has explained that ‘the lack of a robust legal basis for controlling exports of cyber-surveillance technologies hampers the EU’s ability to prevent exports that may be misused for human rights violations or against the EU’s critical infrastructure’.⁹⁸ The Commission has highlighted that a review of the general approach to the regulation of dual-use items and the inclusion of human security dimension in export control ‘moves beyond the traditional military and state-centered approach to security – which underpins current regulations – towards a wider approach also taking into consideration the security of the EU, its citizens, and companies’.⁹⁹ Thus, apart from considering traditional security concerns posed to the EU members, the EU documents refer to cyber-security and human security as important dimensions of export control regulations on the EU level.

(2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0244&from=LT> (accessed 22 Oct. 2021).

⁹³ Communication from the Commission to the Council and the European Parliament, *The Review of Export Control Policy: Ensuring Security and Competitiveness in a Changing World*, COM/2014/0244 final (2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0244&from=LT> (accessed 22 Oct. 2021).

⁹⁴ Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union’s Foreign and Security Policy, the European Union Global Strategy (2016), https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf (accessed 22 Oct. 2021).

⁹⁵ Sebastian Harnisch & Kim Nam-Kook, *Human Security: A Potential for Cooperation in the EU and East Asia*, 11 *통권 21호* (Korean Journal of European Integration) 143, 152 (2020).

⁹⁶ *Commission Welcomes Agreement on the Modernisation of EU Export Controls*, European Commission (9 Nov. 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2045 (accessed 22 Oct. 2021).

⁹⁷ Council Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) COM(2016) 616 final (30 Sep. 2016).

⁹⁸ Commission Staff Working Document Impact Assessment, Report on the EU Export Control Policy Review Accompanying the document Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (Recast), SWD/2016/0315 final – 2016/0295.

⁹⁹ *Ibid.*

In addition to cyber-surveillance items listed in EU Dual-Use Control List, the revised EU Dual-Use Regulation sets out a ‘catch-all’ control over the export of cyber-surveillance items if ‘the exporter has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part, for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law’; or an exporter is aware, according to its due diligence findings, that cyber-surveillance item which the exporter proposes to export, not listed in the Dual-Use Control List, are intended, in their entirety or in part, for internal repression and/or the commission of serious violations of human rights and international humanitarian law.¹⁰⁰ Notably, standards ‘internal repression’ or ‘in the commission of serious violations of international humanitarian law’ have been previously applied only to military technology or equipment regulation in the EU.¹⁰¹ The revised EU Dual-Use Regulation has already been the target of criticism for this, namely given that it creates a category of unspecified technologies under the EU’s dual-use export control regulations that would not be predetermined based on the characteristics of the technology, but rather on the end-use of the technology – that may cause human rights and international humanitarian law violations.¹⁰² Given that the revised EU Dual-Use Regulation does not provide criteria to determine what counts as a ‘serious’ human rights violation and leaves some other concepts open, it can be expected that in the nearest future the CJEU will have to deal with some of the questions arising from the interpretation of the provisions of the revised EU Dual-Use Regulation.

Consequently, the revised EU Dual-Use Regulation confirms the change in the EU policy towards the regulation of dual-use export control regime to include other considerations in addition to traditional national security concerns. In particular, the activities of the EU in the areas such as terrorism, migration, cyberspace, and protection of human rights can be seen as an example of collective securitization requiring that the EU acts on behalf of its members who themselves may have individual securitizing imperatives.¹⁰³ By expanding the scope of export controls to emerging technologies and proclaiming new objectives of export restrictions, the EU could be able to achieve greater coherence with other EU policy tools, namely human rights sanctions currently in work.¹⁰⁴ At the same time, there are

¹⁰⁰ EU Dual-Use Regulation, *supra* n. 9, at Arts 5(1) and 5(2).

¹⁰¹ See e.g., Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335 13 Dec. 2008.

¹⁰² Whang, *supra* n. 60, at 22.

¹⁰³ Sperling & Webber, *supra* n. 35, at 236.

¹⁰⁴ Maria Shagina, *Revising EU Export Controls: A Path to Greater Coherence?*, Rusi (17 Nov. 2020), <https://rusi.org/explore-our-research/publications/commentary/revising-eu-export-controls-a-path-to-greater-coherence> (accessed 22 Oct. 2021).

no grounds to suggest that the rise of new security concerns and ethical considerations – including those related to human rights – is blurring the lines between economic and national security within the EU.¹⁰⁵ In comparison with the states that consider economic security to be related to their national security issues and that almost every transaction with certain actors poses a threat to their national interests, the EU seems to be more resilient and better able to defend its values without resorting to excesses of securitization.¹⁰⁶ In the EU, human security as a policy concept is currently interpreted as an ‘umbrella’ term covering the concerns over physical integrity and equal participation in post-conflict reconstruction and humanitarian assistance missions rather than economic development.¹⁰⁷ This can be also confirmed by the cases in which the EU has imposed economic sanctions to stop or prevent human rights violations (such as in response to the military coup and the serious human rights violations in Myanmar/Burma coup).¹⁰⁸ Furthermore, the Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the framework of the CFSP specify that ‘[EU] restrictive measures do not have an economic motivation’.¹⁰⁹ Thus, the EU practice in the sanctions domain suggests that even with the revised EU Dual-Use Regulation, the EU can be expected to stay closer to the traditional objective of export controls than the US, i.e., controlling the export of items on the multilateral regime control lists for non-proliferation-related and anti-terrorism reasons.

4.3 EXPORT CONTROLS IN CHINA

In the early 1990s, China was severely lacking the export control regime on WMD.¹¹⁰ Chinese transfers of nuclear weapons-related and ballistic missile-related equipment, materials, and technologies have significantly aided the development of weapons programs in South Asia and the Middle East.¹¹¹ Due to in part increasing international pressure, and a desire to improve its international reputation, the

¹⁰⁵ Dekker & Okano-Heijmans, *supra* n. 5.

¹⁰⁶ Buzan, *supra* n. 19, at 1118.

¹⁰⁷ Harnisch & Nam-Kook, *supra* n. 95, at 157.

¹⁰⁸ Common Position of 28 Oct. 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Burma/Myanmar, OJ L 287, 8 Nov. 1996.

¹⁰⁹ Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Council of the EU (2018), <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf> (accessed 22 Oct. 2021).

¹¹⁰ Luigi Sammartino, *The Syrian Conflict and Prohibitions of Arms Transfers: What Are States Doing in Order to Implement Their International Obligations?* (The Arab Spring and Syrian Crisis: International and Regional Dimensions 2017), <https://ssrn.com/abstract=3477874> (accessed 22 Oct. 2021).

¹¹¹ Evan S. Medeiros, *Chasing the Dragon Assessing China's System of Export Controls for WMD-Related Goods and Technologies* (RAND Corporation 2005), <https://www.rand.org/pubs/monographs/MG353.html> (accessed 22 Oct. 2021). Also available in print form.

Chinese government decided to take steps directed to improving its export control regime.

China's export restrictions have been criticized for their flaws and hidden motives on several occasions. To illustrate, in 2010, China decided to restrict rare earth minerals exports to Japan during a maritime standoff near the disputed Senkaku/Diaoyu islands allegedly in response to the detention of the captain of a Chinese fishing boat by a Japanese Coast Guard crew.¹¹² Restrictions on rare earth metals exports led to substantial damage to Japan because of the absolute dependency of its high technology production on rare earth imports from China.¹¹³ Even after the release of the Chinese fishing boat captain in September 2010, rare earth shipments from China to Japan did not resume until November 2010, and then only at considerably reduced levels.¹¹⁴ Some have argued that China had taken steps to curtail the exports of rare earth as an effort to advantage Chinese electronics manufacturers compared with foreign competitors, and therefore the ban was also economically motivated.¹¹⁵ Japan collaborated with the US and the EU on a WTO case against China on the matter, which they won in 2014.¹¹⁶

The official release of ECL of 2020 marks the beginning of a new phase in China's export control legislation.¹¹⁷ The ECL is claimed to be enacted to maintain *national security and interests*, perform non-proliferation and other international obligations, and strengthen and regulate export control.¹¹⁸ Apart from dual-use items, as well as military and nuclear items, mentioned in the controlled lists, the ECL covers other goods, technologies, services, and items relating to the maintenance of national security and interests of China or subject to international obligations, such as non-proliferation, which might suggest that the items subject to control may well extend beyond traditionally sensitive goods, services and technologies,¹¹⁹ and may include any items relevant for nuclear, political, economic, society, technology, and cultural interests of China.¹²⁰ Notably, throughout the ECL, references to 'national security' in prior drafts were replaced with

¹¹² Ryan David Kiggins, *The Strategic and Security Implications of Rare Earths*, in *The Political Economy of Rare Earth Elements: Rising Powers and Technological Change* 1 (Ryan David Kiggins ed., Palgrave Macmillan UK 2015).

¹¹³ *Ibid.*, at 1.

¹¹⁴ *Ibid.*, at 1–2.

¹¹⁵ *Ibid.*, at 13.

¹¹⁶ China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum Appellate Body Report adopted on 29 Aug. 2014 (21 Oct. 2021), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm (accessed 22 Oct. 2021).

¹¹⁷ ECL of 2020, *supra* n. 8.

¹¹⁸ *Ibid.*, at Art. 1.

¹¹⁹ *Ibid.*, at Art. 2.

¹²⁰ Joel Slawotsky, *The Fusion of Ideology, Technology and Economic Power: Implications of the Emerging New United States National Security Conceptualization*, 20 Chin. J. Int. L. 3, 55 (2021).

references to ‘national security and interests’.¹²¹ Such differentiation between ‘national security’ and ‘national interests’ of China can also signal that the ECL does not intend to limit the scope of its regulation to the items relevant for China’s national security purposes but expressly provides an additional ground for export control measures designed to advance foreign policy or industrial policy goals of China unrelated to conventional defense and security threats and going beyond the protection of traditional national security interests.¹²²

Importantly, the ECL has been characterized as China’s response to the increasing tension over growing restrictions on US-China technology transfers, such as the placement of Huawei and many other Chinese companies on the sanctions list and the broadening of the military end-use and end-user restrictions against China in Jun. 2020.¹²³ Even before the ECL came into effect, China had already taken actions to curb the export control of sensitive technologies, specifically to the US. To illustrate, in August 2020, in the forced TikTok sale demanded by the US government, China updated its Catalogue of Technologies Whose Exports Are Prohibited or Restricted to add technologies, including ‘personalized information push service technology based on data analysis’ relied upon by TikTok.¹²⁴

Although the ECL is not limited to and does not explicitly target US companies, it allows for the imposition of unspecified ‘reciprocal measures’ against any country or region that abuses export control measures to endanger China’s national security and interests, which allows China to respond to any measures adopted by foreign governments against it leaving the authorities sufficient room to promote Chinese national security and interests as they deem fit.¹²⁵ Commentators note that combined with the Regulations on the Unreliable Entity List, the ECL will equip China to react to any US trade measures targeted at its companies and economy, and thus to protect its national security and other interests, including the interests of its economy.¹²⁶ Against this background, the US-China trade tension is a good illustrative example of how the expanded understanding of security interests by one counterparty (the US in this case) is also creating a domino effect wherein another counterparty (i.e., China) re-orientes its trade policies and redefines the

¹²¹ *Ibid.*, at 11–12.

¹²² *Ibid.*, at 12.

¹²³ *China’s New Export Control Regime May Affect Companies Worldwide*, De Brauw (13 Jan. 2021), <https://www.debrauw.com/articles/chinas-new-export-control-regime-may-affect-companies-worldwide> (accessed 22 Oct. 2021).

¹²⁴ *2020 Year-End Sanctions and Export Controls Update*, Gibson Dunn (5 Feb. 2021), <https://www.gibsondunn.com/2020-year-end-sanctions-and-export-controls-update/> (accessed 22 Oct. 2021).

¹²⁵ ECL of 2020, *supra* n. 8, at Art. 48.

¹²⁶ *China’s New Export Control Regime May Affect Companies Worldwide*, De Brauw (13 Jan. 2021), <https://www.debrauw.com/articles/chinas-new-export-control-regime-may-affect-companies-worldwide> (accessed 22 Oct. 2021).

scope of the interests protected thereunder. It remains to be seen how exactly China's new export control regime will be applied in practice and what its implications may be for foreign counterparties active in and trading with China.

4.4 EXPORT CONTROLS IN RUSSIA

The Soviet Union, the predecessor of Russia was, in fact, the major target of the Western export control regimes in the past.¹²⁷ After the breakup of the Soviet Union in late 1991, Russia had a huge arsenal of WMD and nuclear material mostly, but not wholly, inherited from the Soviet era, as well as a large number of both defense and dual-use manufacturers, and thus of dual-use exports.¹²⁸ Even though Russia did not intend to follow the policies of the Soviet Union in all strategic matters, the general perception in the Western world, as well as elsewhere, remained to have a little distinction between the two regimes.¹²⁹ All these factors demanded the establishment of a new export control regime in Russia, including legislation, licensing procedures, and international cooperation on the multilateral export control matter.¹³⁰

Pursuant to the Export Control Law of 1999, Russia implements its export control regime in order to ensure the security of the state, its political, economic, and military interests.¹³¹ In particular, the main objectives of export control are stated as the protection of the interests of Russia; implementation of the requirements of its international treaties in the field of non-proliferation of WMD, means of their delivery, as well as in the field of control over the export of military and dual-use products; creation of conditions for the integration of the economy of Russia into the world economy; and combatting international terrorism.¹³² Thus, Russia seems not only to aim to adhere to the multilateral export control regimes to which it is a party but also to protect its national interests, not limited to security interests. Given that Russia's National Security Strategy defines Russia's security interests in rather economic terms and that the objectives of Russia's export control are formulated broadly enough as to include the creation of conditions

¹²⁷ Rajiv Nayan, *Global Strategic Trade Management: How India Adjusts Its Export Control System for Accommodation in the Global System*, 56 (New Delhi: Springer India 2019).

¹²⁸ Elisey Andreevsky & Yury Daneykin, *Analysis of an Export Control System: The Russian Federation*, WorldECR – the Journal of Export Controls and Sanctions (2015), https://www.researchgate.net/publication/271195484_Analysis_of_an_export_control_system_the_Russian_Federation (accessed 22 Oct. 2021).

¹²⁹ Nayan, *supra* n. 127, at 56.

¹³⁰ Vladimir A. Orlov, *Export Controls in Russia: Policies and Practices*, 6 Nonproliferation Rev. 139, 139 (1999).

¹³¹ Russian Federal Law No. 183-FZ On Export Controls, Russian State Duma, 22 Jun. 1999.

¹³² *Ibid.*

for the integration of the economy of Russia into the world economy,¹³³ it can be suggested that the general framework of Russia's export control encompasses various interests of the Russian Federation, including its economic interests, and thus moves beyond the traditional military and defense-related control objectives.

In practice, Russia seems to continue to follow an unofficial policy prioritizing export promotion over export controls and a longstanding tradition of military, economic and technical cooperation with problematic countries (e.g., Iran and North Korea).¹³⁴ To illustrate, Russia has sought to become a major actor and broker in the Middle East, including its support to Bashar Assad in the Syrian civil war and work with Iran to ensure Assad's victory.¹³⁵ In the face of compelling evidence that the Assad regime has used chemical weapons against its opponents, Russia, supported by China, has opposed efforts by the Organization for the Prohibition of Chemical Weapons to attribute chemical weapons use to the Syrian government.¹³⁶ This suggests that Russia seems to try to balance, on the one hand, its declared interest in non-proliferation, and on the other hand, its geopolitical interest in supporting partners that pose proliferation risks, such as Syria, and commercial interest in selling nuclear reactors or other controlled items.¹³⁷

5 CONCLUSION

From the very beginning, the US and the EU dual-use export control regulations largely adhered to the multilateral export control regimes but also incorporated national security concerns. The motivations for implementing export control regimes in Russia and China have been always different from those of the US and the EU. That can partially explain Russia's and China's initial unwillingness to participate in multilateral export control regimes and several cases when the export from these countries resulted in the proliferation of weapons and other actions that the multilateral export control was designed to prevent. At the same time, the updated Chinese regulatory framework seems to transform China's export controls into another tool used to combat sanctions and other restrictions imposed by foreign governments against it.

¹³³ National Security Strategy of the Russian Federation to 2020 Approved by Decree of the President of the Russian Federation 12 May 2009 No. 537 (unofficial translation), <https://thailand.mibidru/en/national-security-strategy-of-the-russian-federation> (accessed 22 Oct. 2021).

¹³⁴ Andreevsky & Daneykin, *supra* n. 128.

¹³⁵ Robert Einhorn, *Revitalizing Nonproliferation Cooperation with Russia and China*, Brookings (blog), (25 Jan. 2021), <https://www.brookings.edu/research/revitalizing-nonproliferation-cooperation-with-russia-and-china/> (accessed 22 Oct. 2021).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

All Selected WTO Members proclaim the objectives of their export control to go beyond the protection of national security in its traditional sense related to military and defense matters and dual-use items. To illustrate, the goals of the export restrictions and their implementation in the US indicate that the US national security interests at least in part intertwine with its economic policy concerns and the race for technological supremacy. The EU clearly emphasizes the human security dimension of its export control, while Russia and China have drafted their regulations in a very broad manner to include any measures necessary for the protection of national security, but also generally national interests of the state, and grant broad discretionary powers to domestic authorities to define in which cases the specific interest of the state is threatened by the intended export. The unclarity and vagueness of certain regulations, specifically in Russia and China, and the lack of uniformity in the lists of controlled items, makes it difficult to predict all possible situations in which Selected WTO Members would subject the transfer of goods, services, and technologies to export control restrictions in the interests of national security.

The analysed practice of the US, China, and Russia in export controls regulations provides some evidence to what some call the realignment and increased convergence of economics and security, or the ‘simultaneous securitization of economic policy and economization of strategic policy’.¹³⁸ In particular, these states seem to actively refer to the interests of national security at least with respect to certain threats posed to, among others, their economic goals and regional stability. Many decisions related to cross-border trade seem not to be taken on solely economic grounds and the governments more often than usual revert to economic tools as a response to the alleged threat to their national security. It seems that the US, China, and Russia have grown to be more concerned about their economic success as an intrinsic part of national security. They attempt to broaden the traditional definition of national security, by claiming, for example, that ‘economic security is national security’,¹³⁹ to use export controls to achieve strategic goals and to invoke national security as an exception in order to justify their unilateral economic measures under international law.

It can be argued that defining something as a security issue might actually be counter-productive or even dangerous.¹⁴⁰ To illustrate, if the export of certain goods or trading with certain counterparties is securitized, emergency action of some sort can be taken to try to counter and eliminate the perceived threat to

¹³⁸ Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *The Geoeconomic World Order*, Lawfare (19 Nov. 2018), <https://www.lawfareblog.com/geoeconomic-world-order> (accessed 22 Oct. 2021).

¹³⁹ National Security Strategy of the United States (2017), *supra* n. 17.

¹⁴⁰ Nelli Babayan et al., *New and Evolving Trends in International Security*, Istituto Affari Internazionali (30 Apr. 2013), https://www.iai.it/sites/default/files/TW_WP_13.pdf (accessed 22 Oct. 2021).

national security, such as stricter export controls regulations prohibiting or restricting certain transactions, which do not necessarily contribute to the flow of resources or the protection of international peace and security. On the contrary, it can result in constraints on trade and investments, more power rivalry among states, states' isolations, and general uncertainty for governments, companies, and individuals. In other words, such emergency actions require serious compromising of liberal values. If the priority is to preserve liberal values, rather than nourishing power games, states might be pushed towards the option of treating the questions of technological supremacy and strategic competition as a part of normal politics rather than securitizing the concerns arising from them. Taking this route, at least to a certain extent, allows establishing the balance between export controls policies and trade liberalization.¹⁴¹

Current geopolitical and economic developments, including the impulsive securitization of certain policy objectives, nevertheless, suggest that the states stretching the concept of national security in domestic regulations might be more willing than others to push (or continue pushing) the boundaries of security exceptions under international law as the only option to fit the new forms of economic warfare into the current environment characterized by deep economic interdependence and complex institutionalization, where the global economy is crisscrossed with many international economic agreements, creating complex networks of obligations, many of which are subject to binding international dispute settlement.¹⁴² However, this is only one part of the story. Re-conceptualizing economic and strategic goals in security terms may equally signal a more superficial shift in the instruments and institutions of the current international order, which may be beneficial for maintaining the continuity of the global system in a long run.¹⁴³

Ultimately, while mapping states' interests in the protection of national security and promoting domestic economic policies, it is the level of democracy, economic interdependence, and membership in international organizations and international regimes that remains most integral to maintaining peaceful cooperation among nations, including on security matters, in light of the universally acceptable values, the commitments to protect human rights, to respect the principles of non-intervention and good faith, and to ensure the proper functioning of the international order. The increased convergence of economic and security mindsets and strategies can contribute to a significant restructuring of the regulations and institutions that govern this order.¹⁴⁴ In view of this, it is not

¹⁴¹ Buzan, *supra* n. 19, at 1115.

¹⁴² *Ibid.*

¹⁴³ Andrew Lang, *Protectionism's Many Faces*, 44 Yale J. Int'l L. 54, 55 (2020).

¹⁴⁴ Roberts et al., *supra* n. 138.

surprising that calls for the clarifications of the concept of security exceptions in international law, as the first step to such reforms, have rarely been louder.¹⁴⁵

The understanding of the concept and scope of security exceptions in international agreements and the legal and policy developments in the states' unilateral practices, including in export controls regulations, will go hand in hand. The more is justifiable under the broadly drafted exceptions clauses in international law, the more freedom some governments might dare to exercise in order to protect their national interests through unilateral measures. At the same time, similar to the domestic level where accommodating the competing demands of national security and legality requires courts to prompt the political branches to strengthen procedures for imposing trade restrictions,¹⁴⁶ clarification of the concept of national security on the international level might prompt states to initiate reforms to ensure a better check of state bodies' discretionary powers and their accountability on the domestic level. However, to start with any speculations about the future of ongoing securitization and its implications for international law requires a better understanding of the role of other security measures in current global affairs, such as economic sanctions and investment screening mechanisms. Thus, this article is only the start of a much more complicated and longer discussion.

¹⁴⁵ See e.g., WTO, *Russia – Measures Concerning Traffic in Transit* (5 Apr. 2019) WT/DS512/R; Saudi Arabia – *Measures Concerning the Protection of Intellectual Property Rights* (16 Jun. 2020) WT/DS567/R.

¹⁴⁶ Heath J. Benton, *The New National Security Challenge to the Economic Order*, 129 Yale L.J. 1020, 1078 (2019).